

HONORABLE ROBERT H. WHALEY

John G. Bergmann
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154
(206) 292-1144
Fax: (206) 340-0902
E-mail: jbergmann@helsell.com
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OSCAR J. BROWNFIELD,

Plaintiff,

v.

CITY OF YAKIMA, a Municipal
Corporation,

Defendant.

No. CV-08-3005-RHW

AGREED PRETRIAL ORDER

May 22, 2009 @ 8:30 a.m.
Judge Robert W. Whaley

A pretrial conference was held in the above entitled cause at Yakima, Washington on May 22, 2009 with The Honorable Robert W. Whaley presiding. Plaintiff was represented by John G. Bergmann and Lish Whitson and Defendant was represented by Jerry J. Moberg, their respective attorneys of record. The following pretrial order has been formulated and proposed as follows:

**NATURE OF PROCEEDINGS AND
STATEMENT OF JURISDICTION**

Plaintiff seeks money damages from the defendant, City of Yakima, his former employer, and makes claims under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12111 et. seq., 42 U.S.C. § 12203(A), 42 U.S.C. 1983 alleging violation of his First Amendment Rights as applicable to the states by way of the Fourteenth Amendment, the Family Medical Leave Act of 1993, 29 U.S.C. § 2601 et. seq., and for discrimination in violation of the Washington Law against Discrimination.

Plaintiff alleges claims that comprise federal questions pursuant to 28 U.S.C. § 1331 and 1921. This Court has jurisdiction over plaintiff's related state claims pursuant to 28 U.S.C. §1367.

The following facts are agreed upon by the parties and require no proof:

1. Plaintiff was hired as a police officer for the City of Yakima on November 15, 1999.

2. Officer Brownfield was in a serious off-duty automobile accident on December 21, 2000. Officer Brownfield was seen by Dr. Richard Drew for a neuropsychological screening in January of 2001. He returned to light duty at the Yakima Police Department on March 1, 2001 and on full duty on July 6, of 2001.

3. Officer Brownfield was married to Leticia Brownfield during part of the time of his employment as a police officer.

1 4. Officer Brownfield returned to Dr. Drew in 2004 stating that he was
2 having difficulty getting along at work, at home and personally.

3 5. From November 1, 2000 through October 31, 2004, Officer
4 Brownfield received above average performance reviews.

5 6. In late 2002, Officer Brownfield was assigned to the community
6 service division.

7 7. On January 23, 2007 Dick Zais ordered Officer Brownfield to report to Dr.
8 Ekemo for a FFD evaluation.

9 8. Jeff Brownfield attended the first session with Dr. Ekemo on February 15,
10 2007. Dr. Ekemo asked him to return to complete additional testing.

11 9. On April 10, 2007 Jeff Brownfield was terminated.

12 **PLAINTIFF'S CONTENTION**

13 **Plaintiff's contentions as to disputed issues are:**

14 1. Plaintiff was hired as a police officer for the City of Yakima on
15 November 15, 1999. He is the father of two young children, a Gulf War veteran
16 and was a decorated police officer while employed with the City of Yakima.

17 2. Officer Brownfield was in a serious off-duty automobile accident on
18 December 21, 2000. He recuperated and returned to light duty at the Yakima
19 Police Department on March 1, 2001 and on full duty on July 6, of 2001.

1 3. Officer Brownfield was seen by Dr. Richard Drew for a
2 neuropsychological screening in January of 2001. Dr. Drew noted in part that “the
3 results of this evaluation indicate he is recovering nicely from his motor vehicle
4 accident. He has returned to work and by his report is experiencing no problems
5 with light duty. He also states: “There appears to be no reason why Mr.
6 Brownfield cannot return to active duty in a gradual and supervised manner.”
7

8 4. Officer Brownfield was married to Leticia Brownfield during the
9 time of his employment as a police officer. Mr. Brownfield had marital problems
10 in 2004 after his wife started a job and their relationship began to deteriorate.
11 Officer Brownfield returned to Dr. Drew in 2004 stating that he was having
12 difficulty getting along at work, at home and personally.
13

14 5. From November 1, 2000 through October 31, 2004, Officer
15 Brownfield received above average performance reviews. Police Chief Granato
16 commented on one of the reviews as follows: “Officer Brownfield has exemplified
17 extraordinary commitment to the City of Yakima and the youth. I want to
18 commend him in his initiative and leadership in the development of Y-PALS.”
19

20 6. In 2001, Officer Brownfield applied for a position with the DARE
21 division. In this position, Officer Brownfield often acted as ambassador for the
22 police department, teaching the DARE program in local elementary schools and
23 working with schools, teachers and community leaders on behalf of Yakima’s
24 youth.
25

1 7. In late 2002, Officer Brownfield was assigned to the community
2 service division. Officer Brownfield was responsible for researching and helping
3 to develop the Yakima Police Athletic League (Y-PAL) which was a new program
4 in the police department. The department received two significant grants and
5 many donations for this program.

6
7 8. In 2004 Officer Brownfield received positive remarks on his police
8 department evaluation. Specifically, it was noted that "Officer Brownfield has
9 been an asset to the Yakima Police Department in the community services
10 division. He is constantly striving to come up with new programs. He does not
11 require constant supervision, for he knows that the tasks at hand have to be
12 accomplished. Officer Brownfield is an asset to the police department."

13
14 9. In 2003 and 2004 Officer Brownfield received the Yakima Police
15 Department's Outstanding Service Award.

16 10. In 2004 Officer Brownfield became concerned about what he
17 perceived to be unethical work practices within the PAL and DARE programs. On
18 June 17, 2004, he sent an interoffice memo to Sgt. Mike Amos outlining what he
19 believed was inappropriate conduct by a fellow officer and by Lt. Mike Merryman.
20 The memo to Sgt. Amos also reported inaccuracies in Y-PAL accounts.

21
22 11. On May 5, 2005, almost one year after Officer Brownfield's initial
23 inquiry into the conduct of Officer Dejournette and Lt. Merryman. Officer
24 Brownfield sent an email directly to Chief Granato requesting a meeting. In this
25

1 email, Officer Brownfield confided to the Chief that he believed that Lt. Merryman
2 was conducting an undisclosed internal investigation on him and other officers.
3 He also included in an email, documents and notes regarding Officer Dejournette.
4 This information had been previously given to Sgt. Amos in his initial memo of
5 June 17, 2004.

6
7 12. On May 10, 2005 Officer Brownfield sent an email to Lt. Merryman
8 and Sgt. Amos to notify them that Crystal Dodge, an employee in the Community
9 Services Division, was overworked and requesting help for employee Crystal
10 Dodge.

11 13. On May 10, 2005 Sgt. Bob Hester, a union representative, requested
12 that Sgt. Amos meet with Officer Brownfield and him. During this meeting,
13 Officer Brownfield expressed his concern that Lt. Merryman was conducting an
14 undisclosed internal investigation. Sgt. Amos told Officer Brownfield that he
15 would arrange a meeting directly with Chief Granato to discuss his various
16 concerns.
17

18 14. On May 11, 2005 in the company of Sgt. Amos, Officer Brownfield
19 entered a meeting room where he thought he would be meeting with Chief
20 Granato. When he arrived, he discovered the meeting was between Sgt. Amos, Lt.
21 Merryman and himself.
22

23 15. During this meeting, Officer Brownfield became concerned because
24 he thought he was going to discuss what he thought were improper actions or
25

1 omissions by Lt. Merryman with Chief Granato. He became upset and walked out.
2 Lt. Merryman and Sgt. Amos told him to stay but he refused to come back without
3 a union representative. Sgt. Amos followed Officer Brownfield out of the meeting.
4 Officer Brownfield lost his temper with Sgt. Amos and disobeyed an order by Lt.
5 Merryman to return to the meeting.
6

7 16. On May 11, 2005 Sgt. Amos sent Chief Granato a memo regarding
8 the incidents that had transpired on May 10th and 11th. Officer Brownfield was
9 notified that the department was initiating an internal investigation into the
10 incident. While the internal investigation into his alleged insubordination was
11 being investigated, Officer Brownfield was transferred from Community Services
12 to patrol.
13

14 17. On June 8, 2005 Cpt. Copeland filed a Detailed Report regarding the
15 department's investigation of Officer Brownfield's complaints regarding Officer
16 Dejournette. Cpt. Copeland's report concluded "there are some performance
17 issues raised that are valid points, and they should be documented on Ofc.
18 Dejournette's next performance evaluation. It appears that Ofc. Dejournette did a
19 rather poor job of keeping the books in order. I do agree that an audit of the PAL
20 books should be done. I also feel that Ofc. Dejournette's failure to close his 2000
21 fraud cases was inexcusable."
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1 18. On July 28, 2005 Officer Brownfield was notified that he was being given a
2 24-hour suspension for insubordination because he walked out of his meeting with Lt.
3 Merryman on May 11, 2005.

4 19. Officer Brownfield's family physician has been Dr. Ray Gondo. Dr. Gondo
5 had seen Officer Brownfield over the years for various matters. Ultimately, Officer
6 Brownfield was diagnosed with hypogonadism and has been receiving testosterone shots
7 since the diagnosis.
8

9 20. On September 1, 2005 Officer Brownfield and Officer Illeanna Salinas had a
10 heated discussion during muster where both officers had elevated voices. There was no
11 intimidating behavior by either officer and both officers remained seated during the entire
12 exchange. Following the argument between the officers, Sgt. Linda Watts called each
13 officer into her office at separate times. She informed both officers that "the type of
14 behavior that occurred between the two of them was inappropriate." It is clear from Sgt.
15 Watts' September 21, 2005 statement that she thought both officers acted inappropriately.
16

17 21. In August 2005, Officer Brownfield called for backup while on patrol. Sgt.
18 Chad Stephens responded to his request. Brownfield had stopped an individual suspected of
19 numerous crimes, including violent crimes. During the encounter Brownfield was "being
20 yelled at by acquaintances of the subjects that he stopped." While Sgt. Stephens was on the
21 scene "the adult male insinuated that he could take Officer Brownfield. Officer Brownfield
22 walked towards him and told him that he would "flatten" him if the subject got any more
23 aggressive" but he did not threaten to "flatten" a 12 year old boy who was at the scene. Capt.
24 Copeland questioned Officer Brownfield's exercise of judgment in calling for back-up.
25

1 However, he later admitted during his deposition that, as a matter of department policy,
2 officers are required to request back-up during a felony traffic stop. Despite acknowledging
3 that Officer Brownfield correctly requested back-up while on patrol, Captain Copeland
4 reported this incident to Dr. Decker as an incident allegedly justify the referral for a Fitness

5 22. On September 15, 2005, Chief Granato ordered Capt. Copeland to conduct an
6 internal investigation into Officer Brownfield's alleged intimidating behavior toward Officer
7 Salinas. After Officer Brownfield was notified that the department was doing an internal
8 investigation into this matter and only with respect to him, he went to Sgt. Watts and
9 requested to speak with Lt. Wentz and her. He was angry and felt like he was being
10 "singled out."
11

12 23. After investigating the incident, Capt. Copeland ultimately found that the
13 situation as a whole did not constitute harassment and he found Chief Granato's allegation
14 to be without merit. He nevertheless put it into his referral letter to Dr. Decker.
15

16 24. In his deposition Capt. Copeland conceded that prior to Chief Granato's order
17 to investigate the Salinas matter, Capt. Copeland had never been asked to conduct an
18 internal investigation of that kind.
19

20 25. Following the favorable resolution of the alleged "harassment" investigation,
21 on September 28, 2005 Capt. Copeland placed Officer Brownfield on administrative leave
22 and ordered him to submit to a fitness for duty (FFD) examination at Dr. Kathleen Decker's
23 office. Dr. Decker was a Seattle psychiatrist who the City of Yakima was using at the time
24 to perform FFDs on some of its employees...
25

1 26. Capt. Copeland repeatedly failed to provide substantive reasons for ordering
2 Officer Brownfield to attend a FFD examination. However, in his Memo to Dr. Decker he
3 provides a plethora of innuendos, gossip, and reports that are refuted by other people. Had
4 Capt. Copeland taken the time to investigate these “facts” his memo to Dr. Decker would
5 have been a much different and less prejudicial document.

6 27. Officer Brownfield’s participation in mixed martial arts fighting apparently
7 was a major reason for Copeland’s recommendation that Officer Brownfield undergo a FFD
8 evaluation. Paradoxically, on numerous occasions, Copeland had commended Officer
9 Brownfield on his training in mixed martial arts and told him he was proud that he had
10 recovered and could participate in mixed martial arts training. On Officer Brownfield’s
11 doctors, Leslie R. Bornfleth, M.D., a neurosurgeon commended Officer Brownfield for this
12 training. Captain Copeland noted Officer Brownfield’s participation in mixed martial arts to
13 Dr. Decker.

14 28. The same month that Officer Brownfield was placed on administrative leave
15 and ordered to attend a FFD evaluation; he received a Certificate of Appreciation for his
16 service and support in the Yakima Police Athletic League.

17 29. The City’s policies permit it to require police officers to submit to FFD
18 examinations if the City has probable cause to believe that an officer was not fit for duty.
19 However, the City never articulated their reason for sending Officer Brownfield to a FFD
20 examination.

21 30. In May of 2005 Officer Brownfield’s relationship with his wife had gotten
22 worse and they separated. This created a great deal of tension and stress for Officer
23

1 Brownfield. During 2005, Brownfield also discovered that his wife had been having an
2 extra-marital affair with one of her co-workers.

3 31. On November 10, 2005 Lt. Tom Foley reported to Capt. Copeland that Ms.
4 Brownfield had reported that she and Officer Brownfield had mutual protection orders
5 regarding each other because of their divorce and that she felt Officer Brownfield had
6 violated the order by leaving a message on her answering machine. In her discussion with
7 Lt. Foley, Ms. Brownfield clearly stated that she did not want Officer Brownfield to get into
8 trouble. Lt. Foley reported that he "heard no direct or implied threat" in the message that
9 Officer Brownfield had left on Ms. Brownfield's answering machine. However, Captain
10 Copeland provided this information to Dr. Decker.
11

12 32. On December 1, 2005 Officer Brownfield was in a car accident on his way to
13 see Dr. G.A. DeAndrea as part of his FFD. He did not suffer any permanent sequelae as a
14 result of that accident. Officer Brownfield also sought the treatment of Dr. Gondo for soft
15 tissue neck pain.
16

17 33. On December 12, 2005 Dr. Decker reported that in her opinion Officer
18 Brownfield was permanently unfit for duty as a police officer. Then on January 5, 2006, as
19 result of Dr. Decker's report, Officer Brownfield was taken off of paid administrative leave
20 and placed on sick leave. On January 12, 2006 Officer Brownfield was notified of his rights
21 under the FMLA and was placed on unpaid FMLA leave retroactive to January 5, 2006. On
22 January 5, 2006 Chief Granato informed Officer Brownfield that his FFD had not been for
23 the purpose of either diagnosis or treatment.
24
25

1 34. On January 26, 2006 Officer Brownfield was told that he was being taken off
2 of administrative leave and placed on FMLA. An FMLA application was filled out and
3 signed by Officer Brownfield, Capt. Copeland and Chief Granato requesting leave for what
4 was characterized as a personal serious illness. Contrary to the City's claim, the application
5 does not request leave related to psychological issues. If the City's contention in that regard
6 is based on the report by Dr. Decker and Dr. Decker's one meeting with Officer Brownfield
7 was not for purposes of diagnosis or treatment, the City is making that assertion with no
8 factual proof.
9

10 35. On February 3, 2006, Dr. Gondo certified, "I have approved that the patient
11 may return to his previous work at full duty status in reference to 1/05/06 Family Medical
12 Leave Act." However, the City refused to reinstate Officer Brownfield to active duty. On
13 March 13, 2006 Officer Brownfield was returned to administrative leave status.
14

15 36. On May 25, 2006 Officer Brownfield was served with a notice of a pre-
16 termination hearing, allegedly because he had been determined unfit for duty by Dr. Decker.
17

18 37. On May 25, 2006, allegedly based upon Dr. Decker's report, Chief Granato
19 and Capt. Copeland notified Officer Brownfield that the City had reasonable cause to
20 terminate him as a police officer for his alleged inability to perform the essential functions
21 of his position with or without accommodation. A pre-termination hearing was scheduled for
22 June 2, 2006.

23 38. After Officer Brownfield was served with the notice of pre-termination
24 hearing, Jim Cline, the attorney for the Yakima police union, hired Dr. Norman Mar to do
25 another FFD evaluation. In his first report, on May 30, 2006, Dr. Mar concluded that he

1 was” unable to definitely conclude one way or the other in this matter given the
2 discrepancies in the various reports.” Dr. Mar also notes, “I am struck by the finality of Dr.
3 Decker’s opinion [a psychiatrist alleging permanent brain damage] while Dr. G. A.
4 DeAndrea [a neurologist] and Dr. Drew [a neurologist] do not characterize Officer
5 Brownfield’s symptoms as untreatable. In fact, Dr. Drew’s reports noted continuing
6 improvement in Officer Brownfield’s adjustment to his accident-related injuries, including
7 the psychological components.”
8

9 39. On May 31, 2006, Chief Granato responded to a request by Jim Cline to re-
10 schedule the hearing to allow Officer Brownfield to obtain additional medical information.
11 On July 25, 2006, Officer Brownfield was given notice that a pre-termination hearing was
12 set for August 3, 2006. That pre-termination hearing was held on that date.

13 40. On August 3, 2006, Dr. Mar wrote a second report regarding Officer
14 Brownfield. He strongly recommended that Officer Brownfield be directed to seek
15 counseling or psychotherapy with a qualified licensed mental health provider. “Officer
16 Brownfield acknowledged his issues and is highly motivated to change.” “It is likely, given
17 Officer Brownfield’s current high level of motivation for treatment and given a very
18 intensive and aggressive course of treatment, he will be able to return to his full range of
19 duties in about three months.” On August 14, 2006 Dr. Decker reviewed Dr. Mar’s report
20 and again said she thought Officer Brownfield was unfit for duty.
21
22

23 41. On August 22, 2006, Dick Zais advised Officer Brownfield he would agree to
24 meet with him for a pre-termination hearing prior to making a final determination on his job
25 status. The meeting was set for September 6, 2006. At that pre-termination hearing, Zais

1 informed Officer Brownfield that he would allow him six additional weeks to complete the
2 treatment recommended by Dr. Mar, and further evaluations by Dr. Decker and Dr. Mar
3 would take place after that. The Interoffice Memo from Capt. Copeland regarding the pre-
4 termination meeting did not address the City's assertion that it informed Officer Brownfield
5 that it may elect to send him to a third medical professional for an evaluation.

6
7 42. On November 29, 2006 Officer Brownfield applied for FMLA retro-active
8 from August 3, 2006 until he returned to work in approximately 3 months. That application
9 was based on Dr. Mar's August 3, 2006 findings that he would be able to return to his full
10 and normal range of duties in about three months. His request was denied on December 13,
11 2006.

12
13 43. On December 22, 2006 Dr. Mar wrote Jim Cline advising him that Officer
14 Brownfield had been making "excellent" progress with Dr. Robert Newell. Dr. Mar
15 concluded that "Given Mr. Brownfield's treatment progress and with continued treatment, it
16 is my opinion that Mr. Brownfield would be able to return to his full and normal range of
17 duties as a Yakima Police Officer."

18
19 44. The City alleges that Dr. Mar did not know Officer Brownfield successfully
20 completed the course of treatment with Dr. Newell. The City had the opportunity to find out
21 the status of Officer Brownfield's treatment with Dr. Newell. Officer Brownfield was
22 actively treating with Dr. Newell from September 2006 to February 2007. Officer
23 Brownfield only stopped treatment from February 2007 to July 2007 because he was having
24 difficulty paying for the treatment. His financial problems resulted from being placed on
25 unpaid leave as a result of the City's response to Dr. Decker's report. Dr. Newell, who saw

1 Officer Brownfield many times over a series of months, significantly differs from Dr.
2 Decker's findings. "In my assessment of Mr. Brownfield I did not determine that impulsive
3 behavior or a tendency to react impulsively was a significant treatment issue." It should be
4 noted that Dr. Decker only saw Officer Brownfield one time.

5 45. After receiving Dr. Mar's December 22, 2006 report, the City referred it to
6 Dr. Decker and to a psychologist, Bill Ekemo, PhD for evaluation. The City wrote to Dr.
7 Ekemo that Dr. Decker "has recommended that we retain your services to conduct the
8 Neuropsychological portion of the FFD exam. Dr. Decker will be making the final
9 recommendation once she has received your material."

10 46. On January 17, 2007 Officer Brownfield advised Capt. Copeland that he had
11 given Dr. Decker a 90-day notice of intent to possibly sue her for illegally releasing his
12 records and from medical malpractice. As a result of this the City apparently decided that
13 the FFD would be completed solely by Dr. Ekemo.

14 47. On January 23, 2007 Dick Zais ordered Officer Brownfield to report to Dr.
15 Ekemo for a FFD evaluation.

16 48. On February 12, 2007 Officer Brownfield responded to this order by
17 requesting clarification of the reasons that the City ordered him for a FFD with Dr. Ekemo.
18 In his response, Officer Brownfield clearly notes his objections to this FFD but agrees to go
19 back to see Dr. Ekemo when the city provides specific duty related incidents that justify the
20 order.

21 49. On February 13, 2007 Dick Zais responded to Officer Brownfield's request
22 for clarification, but failed to articulated the City's duty to relate specific incidents that
23

1 justify sending him to a third FFD evaluation, especially since numerous medical care
2 providers had determined he would be fit for duty with continued treatment.

3 50. On February 27, 2007 Dr. Ekemo notified the YPD that Officer Brownfield
4 came in to see him on February 15, 2007, but that he would need to continue the assessment
5 by giving Officer Brownfield some of the same types of tests that had been administered by
6 other evaluators and treaters. There is no explanation for why additional tests were
7 necessary.
8

9 51. On March 8, 2007, Dick Zais issued an amended notice of pre-termination
10 hearing to Officer Brownfield setting the pre-termination hearing for March 19, 2007. The
11 pre-termination hearing was held on that date. On April 10, 2007, Dick Zais notified Officer
12 Brownfield that he was terminated for insubordination because he refused Mr. Zais's order
13 to complete a third FFD evaluation with Dr. Ekemo and because Dr. Decker had said he was
14 unfit.
15

16 52. In late 2007, Dr. Decker was informed by the Office for Civil Rights that she
17 violated Officer Brownfield's privacy rights by failing to comply with the Health Insurance
18 Portability & Accountability Act (HIPAA). Further, on May 30, 2008 Dr. Decker was
19 informed by the Office for Civil Rights that none of the "Fit for Duty Evaluation
20 Acknowledgments" she had Officer Brownfield sign qualified under the Privacy Rule as a
21 valid authorization for any of her disclosures to Officer Brownfield's employer. This was
22 also true of several of the "Release of Information Authorization" forms she had Officer
23 Brownfield sign.
24
25

1 53. On May 7, 2007 the police union filed a notice of appeal of Officer
2 Brownfield's termination with Capt. Schneider. On May 18, 2007, Capt. Schneider
3 denied the union's grievance on procedural grounds. On June 4, 2007, the union
4 filed its grievance regarding Officer Brownfield's termination with Dick Zais. On
5 July 13, 2007 Dick Zais denied the union's grievance.
6

7 54. Chief Samuel Granato was hired as Chief of Police for the City of
8 Yakima in September of 2003. Prior to become the City of Yakima Chief of Police,
9 Chief Granato was terminated as Chief of Police in Kingsville, Texas in July of
10 2003 for insubordination.

11 55. A careful investigation of Chief Granato's history with the Corpus
12 Christi, Texas Police department and the Kingsville, Texas Police Department
13 would have disclosed a history of suits against Granato for retaliation,
14 discrimination and wrongful termination, a pending criminal indictment for
15 interference with an ongoing criminal investigation, conflicts with his city
16 manager and with the Kleberg County Sheriff.
17

18 56. Prior to his position in Kingsville, Texas, Chief Granato served all
19 ranks up to Capt. in Corpus Christi, Texas. While working in Corpus Christi,
20 Chief Granato was sued by police officer, Kelly Lewis, for violation of the state
21 Whistleblower Statute. The city of Corpus Christi eventually settled with Officer
22 Lewis.
23
24
25

1 57. Chief Granato was hired by the Kingsville Police Department on
2 September 11, 2000. In 2001, Sgt. Arthur Rogers sued the Kingsville PD for
3 wrongful termination and discrimination. The claim was settled for \$207,500.
4 Rogers is now the Chief of Police in Yoakum, Texas.

5 58. On March 22, 2002 Corpus Christi police officers filed an Offense
6 Report against Chief Granato for compromising an undercover investigation.
7 Around May of 2003, Chief Granato was subject of a felony grand jury indictment
8 for his conduct as Chief of Police in Kingsville, Texas. The indictment was for
9 felony retaliation. The Grand Jury alleged that Chief Granato had transferred
10 police officers out of the command of Lt. Alveraz in retaliation because Lt. Alveraz
11 gave testimony to the Grand Jury which resulted in indictments.
12

13 59. On June 20, 2003, Carlos Valdez the District Attorney in for the 105th
14 Judicial District of Texas, wrote a letter to the City of Kingsville Interim City
15 Manager regarding Chief Granato's criminal behavior. Specifically, he notes "It
16 has come to my attention that Chief Sam Granato is attempting to interfere with
17 an ongoing criminal investigation and also tampering with and attempting to
18 intimidate a witness in two pending criminal case."
19

20 60. In 2003, Capt. Schneider was commissioned by the City of Yakima to
21 do a pre-employment background investigation of Chief Granato. Capt. Schneider
22 traveled to Corpus Christi, TX and Kingsville, TX to conduct a pre-employment
23 background investigation. Prior to Capt. Schneider's trip to Texas, Waldron &
24 25

1 Company did an initial screening of Chief Granato. Capt. Schneider never spoke
2 with anyone at Waldron regarding their initial screening.

3 61. During Capt. Schneider's pre-employment background investigation,
4 he learned that the "DA called for a grand jury investigation, which resulted in an
5 indictment of the union and a sergeant in the department." In Capt. Schneider's
6 handwritten notes he commented that "the investigation is ongoing and may
7 result in an indictment of Granato possibly for perjury."
8

9 62. Although Capt. Schneider was informed of Lt. Alvarez's complaint
10 against Chief Granato during his investigation, he did not interview Lt. Alvarez. It
11 is clear that Sheriff Gonzales, a Texas sheriff, had given Capt. Schneider
12 information about how to contact Arthur Rogers. During his investigation Capt.
13 Schneider also failed to interview Arthur Rogers.
14

15 63. While Capt. Schneider was conducting his investigation, Chief
16 Granato was placed on administrative leave from the Kingsville Police Department
17 and he was asked to resign.
18

19 64. After returning from Texas, Capt. Schneider gave City Manager Zais
20 a verbal report based on the information he gathered on Chief Granato. City
21 Manager Zais knew about the felony retaliation charges and the pending
22 indictment of Chief Granato prior to hiring him as the Chief of Police. However,
23 despite receiving this information Zais "Felt confident that we could go forward,
24 that I could make that appointment and feel confident at the end of the day the
25

1 chief would be exonerated from those allegations” in Texas. In his deposition
2 testimony Zais admitted that he did not know why Capt. Schneider failed to talk
3 to Chief Roger, Sam Granato’s main adversary in Texas.

4
5 **DEFENDANT’S CONTENTIONS**

6
7 **Defendant’s contentions as to disputed issues are:**

- 8 1. Yakima did not consider plaintiff disabled when they referred him to a
9 fitness for duty examination.
- 10 2. Plaintiff cannot establish that he was able to perform the job with or
11 without accommodation.
- 12 3. Brownfield’s termination was based on a legitimate non-discriminatory
13 reason.
- 14 4. Yakima complied with the ADA requirements for a fitness-for-duty
15 examination.
- 16 5. Plaintiff cannot establish a 42 USC § 1983 First Amendment Claim.
- 17 6. His First Amendment Claim involves matters of private concern and are
18 unprotected speech.
- 19 7. Plaintiff cannot establish a causal link between his speech and his later
20 termination.
- 21 8. Plaintiff cannot establish a Retaliation claim under the Washington law
22 against discrimination.
- 23 9. Plaintiff did not oppose a forbidden practice.
- 24
25

1 10. Plaintiff cannot establish a link between his termination and any alleged
2 protected activity.

3 11. Plaintiff cannot prove the reason for termination was a pretext.

4 12. Plaintiff cannot establish a claim under the Family Medical Leave Act
5 (FMLA) 29 USC §2601.

6 13. Yakima's refusal to return Plaintiff to work was not a violation of FMLA.

7 14. Dr. Ekemo's Evaluation was permitted by both FMLA and ADA.

8 15. Capt. Copeland's Referral of plaintiff to Dr. Decker and Dr. Ekemo
9 complied with both the FMLA and ADA.

10 16. Plaintiff cannot establish a state law claim alleging negligent hiring and
11 retention of Chief Granato.

12 17. Plaintiff has not suffered any compensable damages for which Defendant
13 would be liable.

14 18. Plaintiff was properly and lawfully terminated from his employment for
15 insubordination for not attending the FFDE of Dr. Ekemo and because he
16 was psychologically unfit for duty.

17
18 ISSUES OF FACT

19
20 **The following are the issues of fact to be determined by trial: The plaintiff is**
21 **required to prove all facts necessary to establish the elements of any surviving**
22 **cause of action and the Defendant is required to prove all the necessary**
23 **elements of any affirmative defense related to surviving causes of action. The**
24 **listing of factual issues remaining in this case is not meant to be inclusive.**
25

1 1. What injuries did Officer Brownfield sustain in his December 2000
2 off duty motor vehicle accident and were any of those injuries permanent?

3 2. Following his return to work was Officer Brownfield's ability to
4 perform the essential duties of his position at any time substantially and
5 injuriously impacted by injuries received from his December 2000 accident?
6

7 [Defendant objects to this paragraph and claims that substantially and
8 injuriously impacted is not the proper legal standard.]

9 3. Did the Defendant City of Yakima's order that Officer Brownfield
10 submit to a Fitness for Duty examination conform to the ADA business necessity
11 exception?
12

13 4. Did Chief Granato directly, or acting through his subordinate
14 officers, retaliate against Officer Brownfield for any actions Officer Brownfield
15 took with respect to the conduct of other YPD officers and/or superiors in his
16 chain of command?

17 5. Did the Defendant City of Yakima subject Officer Brownfield to a
18 fitness for duty examination in violation of the ADA?
19

20 6. Did the City retaliate when Officer Brownfield attempted to assert
21 his rights under the Americans with Disabilities Act?

22 7. Were the City's actions in ordering Officer Brownfield to Fitness for
23 Duty examinations a pretext for discrimination and retaliation?
24
25

1 8. Were there specific impairments that would justify a referral for a
2 psychological Fitness for Duty examination?

3 9. Did the Defendant City treat other YPD officers, who were known
4 friends of the chief, differently for conduct that was similar or worse than the
5 conduct of Officer Brownfield?

6 [Defendant objects to this paragraph and does not believe that this factual
7 issue is material to this case. This is a “class of one” argument that is irrelevant.]
8

9 10. Was Officer Brownfield the subject of an adverse employment
10 action?

11 11. Was there a causal link between his protected activity and the
12 adverse action taken by the City?

13 12. Did the City perceive Officer Brownfield to be disabled within the
14 meaning of the Washington Law Against Discrimination?

15 13. Did the City produce a legitimate nondiscriminatory explanation for
16 its adverse employment action?
17

18 14. Did Officer Brownfield suffer an adverse employment action?
19

20 15. If so did Officer Brownfield produce evidence that the City’s stated
21 explanation was pre-textual?

22 16. Did the City ever identify the essential functions of his job that
23 Officer Brownfield was allegedly no longer capable of performing?
24
25

1 [Defendant objects to this paragraph. This is irrelevant to the issues in this
2 case.]

3 17. Was Officer Brownfield's email to Chief Granato protected speech? If
4 so, was it a substantial or motivating factor in the City's actions against him?

5 18. If the speech was protected, did Officer Brownfield's complaint
6 outweigh the City's interest in promoting the efficient delivery of public services?

7 19. After the City placed Officer Brownfield on Family Medical Leave
8 Act benefits on January 5, 2006 following Dr. Decker's statement that Officer
9 Brownfield was unfit for duty, did the City require Officer Brownfield to provide a
10 fitness for duty certification from his doctor before it would restore him to active
11 duty?
12

13 20. Did Officer Brownfield provide a certification from his family doctor,
14 Dr. Gondo, that he was fit for duty?
15

16 21. After submission of the certification from Dr. Gondo, did the City
17 restore Officer Brownfield to duty?
18

19 22. Did the City hire Sam Granato knowing that he had been fired as
20 Chief of the Kingsville, Texas Police Department?

21 23. Did the City hire Sam Granato knowing that he had been sued for
22 retaliation under Texas Whistleblower laws for his conduct while with the Corpus
23 Christi, Texas police department?
24
25

1 24. Did the City hire Sam Granato knowing that he and the Kingsville,
2 Texas police department had been sued for wrongful termination and
3 discrimination by Kingsville Sgt. Arthur Rogers?

4 25. Did the City Hire Sam Granato knowing that the Rogers claim had
5 been settled for over \$200,000.00?

6 26. Did the City hire Sam Granato without even interviewing Arthur
7 Rogers who is now the Chief of the Police Department in Yoakum, Texas?

8 27. Did the City hire Sam Granato knowing that City of Kingsville had
9 initiated a criminal investigation into Sam Granato's tampering with or
10 intimidating a witness in an ongoing criminal investigation?
11
12

13
14 ISSUES OF LAW

15 **The following are the issues of law to be determined by the Court:**

16 1. As a matter of law, did the City violate the ADA, 42 U.S.C. § 12111
17 et. seq. when it ordered Officer Brownfield to submit to the initial fitness for duty
18 examination?
19

20 2. As a matter of law, did the City violate the ADA, 42 U.S.C. §
21 12203(a), by retaliating against Officer Brownfield for asserting his right under the
22 ADA not to submit to fitness for duty exam?

23 3. As a matter of law under WLAD, is an employee perceived to be
24 disabled when his employer: (a) places him on administrative leave; (b) orders
25

1 him to attend a series of fitness for duty examinations; and (c) is adjudged unfit
2 for duty by the medical doctor commissioned by the employer to perform the
3 examination?

4 4. As a matter of law, once the City placed Officer Brownfield on FMLA
5 leave on Jan. 5, 2006, following receipt of Dr. Decker's opinion that he was unfit
6 for duty, did the FMLA (and not the ADA) control the manner by which Ofc.
7 Brownfield could be returned to active duty?
8

9 5. As a matter of law, did the City violate the FMLA when it: (a) refused
10 to restore Officer Brownfield to active duty, see 29 C.F.R. § 825.312; (b) when it
11 refused to honor Dr. Gondo's fitness for duty certification, Id.; (c) when it took
12 Ofc. Brownfield off FMLA leave and placed him on administrative leave; (d) when
13 it contacted Dr. Gondo without first obtaining Ofc. Brownfield's consent or
14 allowing him to cure his fitness for duty certification, see 29 C.F.R. §§ 825.307(a),
15 312(b); (e) when it required a second or third medical opinion and ordered Officer
16 Brownfield to see Dr. Ekemo a second time, see 29 C.F.R. § 825.312(b); (f) when it
17 terminated Officer Brownfield for refusing to obey that order, which was unlawful
18 under the FMLA?
19
20

21 [Defendant objects to sections (e) and (f) of this paragraph. It did not
22 require a second or third medical opinion regarding his FMLA leave or order him
23 to see Dr. Ekemo as a result of his FMLA leave.]
24
25

6. As a matter of law, was the City of Yakima negligent in the hiring or retention of Chief Granato?

EXHIBITS

The following exhibits may be received in evidence, if otherwise admissible, without further authentication, it being admitted that each is what it purports to be:

Plaintiff's proposed exhibits:

See Plaintiff's Exhibit List (Court Record 155).

Defendant's proposed exhibits:

See Defendant's Exhibit List (Ct. Rec. 151)

The following plaintiff's exhibits are objected to by defendant:

See Plaintiff's Objections to Defendant's Exhibits (Ct. Record 157).

The following defendant's exhibits are objected to by plaintiff:

See Defendants Objections to plaintiffs exhibits (Ct. Rec. 152)

Other than for impeachment purposes, the only exhibits admitted at trial will be exhibits identified herein or on a supplemental list filed at least fifteen days before trial, or at such earlier date as may have been set by the court, which supplemental list shall bear counsel's certificate that opposing counsel has had an opportunity to examine the exhibits. Parties will be granted leave to file additional exhibits during trial, the need for which could not be anticipated before trial, as long as the exhibit was properly disclosed in prior discovery in this case or there is a justifiable reason that the document was not disclosed in prior discovery.

Objections to exhibits, except as to relevancy, must be heard prior to trial.

WITNESSES

The following witnesses may be called by plaintiff (if expert, give field of expertise):

See Plaintiff's Witness List (Court Record 156).

The following witnesses may be called by defendant (if expert, give field of expertise):

See the Defendant's Witness List (Crt. Rec. 151)

Other than for rebuttal purposes, no witnesses may be called unless listed above.

RELIEF SOUGHT

TRIAL

The parties estimate 10 days trial time. The parties stipulate and agree that (check the appropriate box):

 x

Two alternate jurors are recommended.

If a juror is excused during trial for good cause the parties stipulate to a verdict by five jurors.

No stipulation reached as to above.

Proposed instructions and trial memoranda shall be filed and served in accordance with the timeline set forth in the scheduling order (Ct. Rec.).

ACTION BY THE COURT

The court has ruled that:

- 1.
- 2.

It is hereby ordered that the foregoing constitutes the pretrial order in the case and that upon the filing hereof all pleadings pass out of the case and LR 1.1 are superseded by this Order. This Order may be amended by consent of the parties and approval by the Court or by the Court to prevent manifest injustice.

DATED this ____ day of _____, 2009.

ROBERT H. WHALEY
United States District Court Judge

COPY RECEIVED AND APPROVED FOR ENTRY:

HELSELL FETTERMAN, LLP



JOHN G. BERGMANN, WSBA No. 0386
Attorney for Plaintiff Oscar Brownfield

LISH WHITSON, PLLC

s/Lish Whitson
LISH WHITSON, WSBA No. 5400
Attorney for Plaintiff Oscar Brownfield

1 JERRY MOBERG & ASSOCIATES

2
3 s/Jerry J. Moberg
4 JERRY J. MOBERG, WSBA No. 5282
5 Attorney for Defendant City of Yakima
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

John G. Bergmann
Hellsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154
jbergmann@hellsell.com; lmckenzie@hellsell.com

Lish Whitson
Kristy Stell
Lish Whitson PLLC
800 Fifth Avenue, Suite 4000
Seattle, WA 98104
lish.whitson@whitsonlaw.com
kristy.stell@whitsonlaw.com

Robert C. Tenney
Meyer, Fluegge & Tenney, PS
P.O. Box 22680
Yakima, WA 98907-2680
tenney@mftlaw.com

Jerry J. Moberg
Jerry Moberg & Associates
451 Diamond Drive
Ephrata, WA 98823
jjmoberg@canfield-associates.com

DATED this 5th day of May, 2009 at Seattle, Washington.

s/John G. Bergmann
JOHN G. BERGMANN, WSBA No. 0386
Attorney for Plaintiff Oscar Brownfield
jbergmann@hellsell.com